

² Counsel did not appeal from July 2 and 16, 2021 OWCP merit decisions. He identified only the August 13, 2021 nonmerit decision on the application for review (Form AB-1). As such, the July 2 and 16, 2021 merit decisions are not properly before the Board on the current appeal. See 20 C.F.R. § 501.3; see also *M.M.*, Docket No. 20-0523 (issued August 25, 2020).

to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 25, 2017 appellant, then a 63-year-old administrative specialist, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her left foot when a 19-pound box fell on her foot while in the performance of duty. She stopped work on the date of injury. OWCP accepted appellant's claim for left ankle and foot arthropathies and left foot fracture. It paid wage-loss compensation on the supplemental rolls beginning March 20, 2017 and placed her on the periodic rolls, effective February 4, 2018.

On March 1, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Robert Smith, a Board-certified orthopedic surgeon, for second opinion evaluation regarding the status of her accepted January 25, 2017 employment injury. In a March 15, 2018 report, Dr. Smith reviewed her history, including the SOAF, and conducted a physical examination. In response to OWCP's questions, he indicated that appellant's accepted left foot fracture and left foot and ankle arthropathies had resolved and that the only remaining medical condition of concern was Complex Regional Pain Syndrome (CPRS)/Reflex Sympathetic Dystrophy (RSD). Dr. Smith recommended a bone scan for the left lower extremity.

On March 14, 2018 OWCP also referred appellant to Dr. Ira Kornbluth, a Board-certified pain management and physical medicine and rehabilitation physician, for a second-opinion examination. In an April 6, 2018 progress note, Dr. Kornbluth indicated that he had reviewed the SOAF, and provided examination findings. In response to OWCP's questions, he reported that appellant had residuals of her left foot arthropathy condition. Dr. Kornbluth opined that she was capable of working in "a light physical capacity level." He completed a work capacity evaluation form (Form OWCP-5c) which indicated that appellant could work full time with restrictions of sitting up to 4 hours, walking, standing, bending/stooping, and operating a motor vehicle up to 1 hour, pushing, pulling, and lifting up to 10 pounds, and no squatting, kneeling, or climbing.

In a June 15, 2018 report, Dr. Lee Ann Rhodes, a Board-certified anesthesiologist and pain medicine physician, recounted appellant's complaints of left lower extremity pain since a January 2017 work-related injury. She noted physical examination findings of slightly reduced

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the August 13, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*

range of motion and strength on the left lower extremity. Dr. Rhodes assessed RSD and opined that appellant's left foot RSD/CPRS was a direct result of her work injury. She also reported that there were no tests to confirm this diagnosis and that bone density tests were not diagnostic.

On August 31, 2018 the employing establishment offered appellant a full-time, modified-duty position as an administrative specialist based on Dr. Kornbluth's work restrictions. The physical requirements of the position included sitting up to 4 hours, walking, standing, operating a motorized scooter, twisting, bending, and stooping up to 1 hour, and pushing, pulling, and lifting up to 10 pounds less than 1 hour.

In an October 18, 2018 supplemental report, Dr. Kornbluth noted appellant's accepted left foot arthropathy and left foot fracture conditions. He indicated that she was not disabled from work and could work at the sedentary physical capacity level.

In a November 30, 2018 letter, Dr. Smith opined that appellant did not have RSD in her left lower extremity causally related to the accepted January 25, 2017 employment incident. He explained that physical examination on March 15, 2018 did not show dystrophic signs of any kind in her left lower extremity.

In a February 1, 2019 addendum note, Dr. Rhodes provided examination findings and assessed CRPS of the left lower extremity. She reported that appellant met the criteria on skin color changes, sensory changes in the area of pain, and edema. Dr. Rhodes indicated that appellant's pain prohibited appellant from working until August 2019.

In a February 5, 2019 letter, a human resources specialist for the employing establishment, advised that the August 31, 2018 job offer remained available. He also noted that appellant did not respond to the August 31, 2018 job offer.

By notice dated February 12, 2019, OWCP advised appellant that it determined that she refused or failed to report to the offered position as a modified administrative specialist. It informed her that it had reviewed the offered position and found that it was suitable in accordance with the medical limitations provided by Dr. Kornbluth in his October 18, 2018 report. Pursuant to 5 U.S.C. § 8106(c)(2), OWCP afforded appellant 30 days to either accept the position or to provide adequate reasons for refusal. It informed her that, if she failed to report to work or failed to demonstrate that the failure was justified, her right to compensation for wage loss or a schedule award would be terminated.

By notice dated March 19, 2019, OWCP notified appellant that her reasons for refusing the August 31, 2018 job offer were not valid. It provided her 15 days to accept the position or have her entitlement to wage-loss compensation benefits terminated. OWCP advised appellant that the offered position remained available.

On April 3, 2019 appellant returned to work, but stopped working after a few hours.⁵

By decision dated April 10, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective April 10, 2019.

On April 9, 2020 appellant, through then-counsel, requested reconsideration. She asserted that new medical documentation from appellant's treating physician demonstrated that appellant was justified in rejecting the August 31, 2018 job offer due to work restrictions resulting from the January 25, 2017 employment injury.

Appellant submitted an April 24, 2019 functional capacity evaluation summary report, which indicated that she was capable of working full-time modified light-duty work. OWCP also received additional treatment notes, laboratory test result reports, and physical therapy notes dated April 24 through November 4, 2019.

By decision dated July 6, 2020, OWCP denied modification of the April 10, 2019 decision.

On April 6, 2021 appellant, through counsel, requested reconsideration. Counsel argued that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation because a conflict in medical evidence existed between Dr. Smith, OWCP's second opinion examiner, and Dr. Rhodes, appellant's treating physician, regarding whether appellant had CPRS of the left lower extremity as a result of the January 25, 2017 employment incident and the need for further medical treatment. Counsel asserted that this issue should have been resolved before OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits based on her refusal of suitable work.

In a June 14, 2019 report, Dr. Rhodes reviewed appellant's history and recounted appellant's complaints of low back pain radiating into the left buttock, thigh, and calf. She provided examination findings and diagnosed CRPS of the left lower extremity. Dr. Rhodes reported that appellant was 100 percent disabled and could not return to work in any capacity.

By decision dated July 2, 2021, OWCP denied modification of the July 6, 2020 decision.

On July 23, 2021 appellant, through counsel, requested reconsideration. Counsel argued that OWCP erroneously interpreted the law regarding a conflict in the medical evidence requirement for a referee medical examination. He contended that a conflict in the medical opinion evidence existed between Dr. Smith and Dr. Rhodes regarding whether appellant had CPRS causally related to the accepted January 25, 2017 employment incident and whether appellant required further medical treatment in order to return to work. Counsel asserted that OWCP erred in terminating appellant's wage-loss compensation benefits before a referee medical examiner could resolve the conflict in medical evidence.

⁵ Appellant subsequently filed a notice of recurrence of disability (Form CA-2a) claim alleging that on April 3, 2019 she sustained a recurrence of the accepted January 25, 2017 employment injury. In a May 12, 2020 decision, OWCP denied the recurrence claim. The recurrence issue is currently not before the Board.

By decision dated August 13, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

With appellant's July 23, 2021 request for reconsideration, counsel submitted a statement alleging that OWCP erroneously interpreted the law regarding a conflict in the medical evidence. He argued that OWCP erred in terminating appellant's wage-loss compensation benefits before an impartial medical examiner could resolve the conflict in medical evidence between Dr. Smith and Dr. Rhodes regarding whether appellant had CPRS causally related to the accepted January 25, 2017 employment incident and whether appellant required further medical treatment in order to

⁶ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *J.W.*, Docket No. 19-1795 (issued March 13, 2010); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

return to work. Appellant's reconsideration request does not advance a new legal argument not previously considered nor show that OWCP erroneously applied or interpreted a specific point of law. Her argument was substantially similar to that which was previously considered and discussed in OWCP's July 2, 2021 decision.¹¹ Consequently, appellant is not entitled to further review of the merits of her claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹²

Furthermore, the Board finds that appellant has not provided any relevant and pertinent new evidence not previously considered.¹³ Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).¹⁴

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁵

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹¹ See *T.S.*, Docket No. 20-0968 (issued August 17, 2021); see also *J.V.*, Docket No. 19-1554 (issued October 9, 2020).

¹² 20 C.F.R. § 10.606(b)(3)(i) – (ii); *P.M.*, Docket No. 20-0780 (issued November 24, 2020); *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

¹³ *T.H.*, Docket No. 20-1598 (issued June 2, 2021); *F.D.*, Docket No. 19-0890 (issued November 8, 2019).

¹⁴ 20 C.F.R. § 10.606(b)(3)(iii); *J.V.*, Docket No. 19-1554 (issued October 9, 2020); *T.M.*, Docket No. 19-0535 (issued July 25, 2019).

¹⁵ *S.M.*, Docket No. 21-0392 (issued August 12, 2021); *D.G.*, Docket No. 19-1348 (issued December 2, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board